

SUMMARY

2018/25 Two new cases consider whether fathers' parental leave should be paid the same as mothers' maternity leave (UK)

Two differently constituted Employment Appeal Tribunals ('EATs') have recently considered whether it is sex discrimination to pay men on parental leave less than women on maternity leave. In Capita, the EAT decided that it was not direct sex discrimination to fail to pay full salary to a father taking shared parental leave, in circumstances where a mother taking maternity leave during the same period would have received full pay. However in Hextall, the EAT has indicated that enhancing maternity pay but not pay for shared parental leave may give rise to an indirect sex discrimination claim by fathers.

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Background

Shared parental leave and pay

In the UK the system of shared parental leave ('SPL') was introduced in 2015 as part of a Government commitment to give parents more flexibility in how they share care for their child in the first year. SPL allows parents to share leave between them for the purpose of caring for their new baby. This right applies to both opposite-sex and same-sex couples, and similar rights apply to couples who are adopting a child.

Under the regime, mothers can choose to bring their maternity leave to an end at any point after the two weeks compulsory leave period following the birth and opt-in to a period of shared parental leave. The amount of SPL and pay available is reduced by any time spent by the mother on maternity leave. SPL is subject to a maximum of 50 weeks' leave, with 37 weeks of pay.

Parents are not obliged to take shared parental leave and mothers can choose to take the full 52 weeks of maternity leave (with 39 weeks paid).

To be entitled to the shared parental leave regime, both parents must meet the following eligibility criteria:

- they must have been continuously employed for at least 26 weeks by the end of the 15th week before the expected week of childbirth;
- they must remain employed until the week before any period of shared parental leave starts;
- they must already have or expect to have main responsibility for caring for their child;
- the mother must be entitled to statutory maternity leave;
- the mother must have curtailed (ended) her entitlement to maternity leave or have returned to work;
- they must have provided their respective employers with notice of entitlement and intention to take shared parental leave;
- they must have provided evidence requested by their employers within 14 days of the request. This may include a copy of the birth certificate and the name and address of the other parent's employers; and
- they must have each given their employer a period of leave notice.

As mentioned above, under the statutory regime, up to 37 weeks of pay is available to be shared between both parents at the lower of the prescribed rate (currently £145.18) or 90% of the relevant parent's normal weekly earnings. This is slightly lower than the rate of statutory maternity pay, which is 90% of actual salary for the first 6 weeks of leave, after which period it is the same rate as for SPL.

It is relatively common for employers to pay enhanced pay to mothers on maternity leave, but less common to enhance pay for SPL.

Direct sex discrimination

Direct sex discrimination occurs where, because of sex, a person (A) treats another (B) less favourably than A treats or would treat others (section 13(1), Equality Act 2010, 'EqA 2010').

In determining whether a man has been discriminated against because of sex, no account is taken of special treatment afforded to women in connection with pregnancy or childbirth (section 13(6)(b), EqA 2010). Therefore a man cannot claim that he has suffered sex discrimination because he has not been accorded the same special treatment.

However, the EAT has held that this does not allow for blanket special treatment (*Eversheds Legal Services Ltd v De Belin* [2011] IRLR 448). Rather, pregnant employees and those on maternity leave should only be treated more favourably than male colleagues to the extent that this is reasonably necessary to remove the disadvantages occasioned by their condition.

Indirect sex discrimination

A discriminates indirectly against B where:

A applies to B a provision, criterion or practice ("PCP").

B has a protected characteristic.

A also applies (or would apply) that PCP to persons who do not share B's protected characteristic.

The PCP puts or would put persons with whom B shares the protected characteristic at a particular disadvantage compared to others.

The PCP puts or would put B to that disadvantage.

A cannot show the PCP to be a proportionate means of achieving a legitimate aim.

Facts and earlier decisions

Capita Customer Management Limited – v – Ali

We reported the first instance decision in *Ali – v – Capita Customer Management Limited* in EELC 2017/3. Capita Customer Management Limited ('Capita') had various policies about pay for different types of family leave. Employees on maternity leave were entitled to 14 weeks full

pay (two weeks compulsory leave plus an additional 12 weeks). In respect of shared parental leave, however, Capita paid the statutory rate of pay only.

Following the birth of his daughter, Mr Ali took two weeks' paternity leave with pay. His wife suffered from post-natal depression and was advised to return to work to assist in her recovery. Mr Ali decided to take leave to care for their child to enable his wife to return to work.

Mr Ali expected to be entitled to full pay during the 12 weeks following the two weeks compulsory maternity leave but was informed by Capita that he would receive pay at the statutory rate, as would a woman taking shared parental leave.

Mr Ali raised a grievance alleging sex discrimination and then brought claims in the Employment Tribunal.

The Employment Tribunal (ET) decided that the treatment of Mr Ali by Capita amounted to direct sex discrimination. The ET held that whilst the initial compulsory maternity leave period of two weeks was specifically associated with recovery of the mother after childbirth and so was unique to the mother, after that period Mr Ali was entitled to compare his treatment to that of a hypothetical female colleague on maternity leave.

The ET concluded that Mr Ali had suffered direct sex discrimination because he would not receive full pay during the 12 week leave period during which a woman on maternity leave would receive full pay.

The ET rejected Capita's argument that the full 14 weeks of maternity leave were special treatment in connection with childbirth, which is an exception to sex discrimination under the Equality Act 2010.

Hextall – v – Chef Constable of Leicestershire police

Mr Hextall is a serving police constable. He joined the Leicestershire Police force in 2003. After the birth of his second child, Mr Hextall took shared parental leave, during which he was paid at the statutory rate. Female police officers who take maternity leave and male and female primary carers on adoption leave have a contractual entitlement to full pay for 18 weeks.

Mr Hextall claimed that if he had been a woman he would have been entitled to full pay

during this period of leave – which amounted to both direct and indirect discrimination.

The ET held that enhancing maternity pay but not shared parental pay was neither direct nor indirect sex discrimination.

In this case, the PCP was that Leicestershire Police only paid statutory pay to parents taking SPL. The ET held that this PCP did not put men at a disadvantage because the same amount was paid to men and women on SPL. The ET felt that Mr Hextall's true case was that men were not disadvantaged by the PCP but disadvantaged by the fact they cannot get pregnant (and that was not capable of being indirect sex discrimination).

Employment Appeal Tribunal Judgments

Capita Customer Management Limited v Ali

Capita appealed the ET's decision. The EAT upheld the appeal on two main grounds.

Firstly, the EAT held that the ET had used the wrong comparator for Mr Ali's claim. The correct comparator was a female employee who was taking SPL in order to care for her child – who would have been treated in exactly the same way as Mr Ali.

The EAT said that the purposes of maternity leave and SPL are different. The right to maternity leave is based on the EU Pregnant Workers Directive and its primary purpose is the health and wellbeing of the pregnant and birth mother. This can be evidenced by the fact that a woman can elect to start her maternity leave before the birth of the child, where there is no child yet to look after. Rights to parental leave have the primary purpose of caring for the child. This means that a woman on maternity leave and a man taking SPL are not in comparable circumstances, because the purposes of the leave are not the same.

Secondly, the EAT held that even if Mr Ali had been able to compare himself with a female employee on maternity leave, his claim could still not succeed. This was because the Equality Act allows for special treatment to be given to women in connection with pregnancy or childbirth. The EAT said that this exemption covers additional pay for a woman on maternity leave.

It was therefore not direct sex discrimination to pay a woman on maternity leave more than a man taking SPL, even when the leave was being taken in the same period after the birth.

Hextall – v – Chef Constable of Leicestershire police

Mr Hextall appealed the ET's indirect discrimination finding. The EAT held that the ET had made errors in considering the test for indirect discrimination and remitted the case to a different ET to consider whether men were in fact disadvantaged by the PCP.

The EAT held that the purpose of indirect sex discrimination was precisely to consider whether men might be disadvantaged in circumstances where men and women appear to be treated the same (in this case by receiving the same pay during SPL).

Although the EAT did not come to a decision, it provided some helpful guidance. The EAT summarised Mr Hextall's case that there was a disadvantage because a man is "*proportionately less likely to be able to benefit from an equivalent rate of pay when taking leave to act as the primary carer for his child to that received by a woman on maternity leave*". That is because men do not have a choice and have to take SPL whilst women who have given birth have the option to take maternity leave or SPL.

In considering whether men have, in fact, suffered a disadvantage, the ET must decide who should be in the pool in order to make a comparative assessment between men and women. The EAT held that the pool for comparison should include police officers with a present or future interest in taking leave to look after a newborn child (including women on maternity leave).

Commentary

It has always been anticipated that potential indirect discrimination would be a greater challenge than direct discrimination to employers paying different rates of pay for maternity leave and SPL.

The question of who should be in the pool for comparison is likely to be the most difficult issue before the ET in the *Hextall* case. The EAT language about the pool for comparison is interesting because it refers to police officers taking leave "*to look after a newborn child*". In *Capita*, the EAT was very clear that the primary purpose of maternity leave (at least in the early stages) is the health and well-being of the mother and not childcare, although women on maternity leave will necessarily be looking after a child. There is an argument that potentially some women on maternity leave should be in the pool for comparison but others should not. If that is the ET's conclusion this may create more legal uncertainty.

Whilst waiting for the ET's decision, it would be sensible for employers who pay different rate for maternity leave and SPL to consider (and record) their justification for doing so. Based on

the EAT conclusions in *Capita*, justification should be easier the shorter the period of enhanced maternity pay. That is because in the period following birth, a mother is still likely to be recovering (and may be breastfeeding) and an employer will be able to assert that it does not want her to compromise her health and feel rushed to return to work for financial reasons.

So at what point does maternity leave tip from being about the health and recovery of the mother to being about care for the child? Will it be the 14 week period protected by Pregnant Workers Directive as suggested by the EAT in *Capita*? Or should it be at the end of the 26 week period of ordinary maternity leave as suggested by the intervenor, Working Families? Or another period?

In the earlier case of *Shuter – v – Ford Motor Company*, the ET accepted that paying women on maternity leave for a full year in order to recruit and retain them in a male-dominated workforce was a valid justification.

Subject: Gender discrimination

Parties: Capita Customer Management Limited – v – Mr Ali and Working Families (Intervenor) - Mr A Hextall – v – Chief Constable of Leicestershire Police and Working Families (Intervenor)

Court: Employment Appeal Tribunal

Date: 11 April 2018; 1 May 2018

Case Number: UKEAT/0161/17/BA; UKEAT/0139/17/DA

Internet Publications: http://www.bailii.org/uk/cases/UKEAT/2018/0161_17_1104.html ;
http://www.bailii.org/uk/cases/UKEAT/2018/0139_17_0105.html

Verdict at:

Case number: